Petition for Writ of Certiora-ri and Brief in Support There-of

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, ~~1947~~ 1948

No. ~~702~~ 53

CLYDE WILKERSON,

Petitioner,

vs.

WILSON McCARTHY AND HENRY SWAN, AS TRUSTEES OF THE DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY, A CORPORATION,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF UTAH AND BRIEF IN SUPPORT THEREOF.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947

No. 792

CLYDE WILKERSON,

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WILSON McCARTHY AND HENRY SWAN, AS TRUSTEES OF THE DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY, A CORPORATION,

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PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF UTAH AND BRIEF IN SUPPORT THEREOF.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

The petition of Clyde Wilkerson respectfully shows:

Summary and Short Statement of Matter Involved

The Supreme Court of Utah, one Justice dissenting, denied petitioner his right of trial by jury guaranteed by the Constitution in an action arising under the Federal Employers' Liability Act where the evidence clearly demonstrated that respondents failed to furnish petitioner, their employee, a reasonably safe place to work and that such

failure proximately contributed to the cause of his injuries. Contrary to the authorities herein cited the Utah Court held, as a matter of law, that the place where petitioner was injured while working was not a work place and therefore respondents were not liable to him for his injuries, loss and damage.

The trial court granted respondents' motion for a directed verdict and entered a judgment dismissing petitioner's complaint (R. 8-10).

The Supreme Court of Utah, one Judge dissenting, affirmed the judgment of the trial court, the majority being of the opinion that respondents had discharged their duty of exercising ordinary care to provide petitioner a reasonably safe place to work.

Petitioner contends that in reaching this result the Utah Court ruled contrary to the principles of law announced by this Court in *Bailey* v. *Central Vermont R. Co.*, 319 U. S. 350, 63 S. Ct. 1062, 87 L. Ed. 1444; *Ellis* v. *Union Pacific R. R. Co.*, 329 U. S. 649, 67 S. Ct. 598; *Tiller* v. *Atlantic Coast Line R. Co.*, 318 U. S. 54, 63 S. Ct. 444, 87 L. Ed. 610, 143 A. L. R. 967; *Tiller* v. *Atlantic Coast Line R. Co.*, 323 U. S. 574, 65 S. Ct. 421, 89 L. Ed. 465; *Tennant* v. *Peoria & Pekin Union R. Co.*, 321 U. S. 29, 64 S. Ct. 409, 88 L. Ed. 520; *Pauly* v. *McCarthy, et al.*, 329 U. S. 698, 67 S. Ct. 102, 91 L. Ed. 609, 330 U. S. 802, 67 S. Ct. 962, 91 L. Ed. 1261 reversing *Pauly* v. *McCarthy, et al.*, 166 P. (2d) 501; *Blair* v. *Baltimore & Ohio R. Co.*, 323 U. S. 600, 65 S. Ct. 545, 89 L. Ed. 490; *Lavender* v. *Kurn*, 327 U. S. 645, 66 S. Ct. 740, 90 L. Ed. 692; *Jesionowsky* v. *Boston & Maine R. R.*, 329 U. S. 452, 67 S. Ct. 401; *Anderson, Administratrix of the Estate of L. C. Bristow, dec.* v. *The Atchison, Topeka and Santa Fe Ry. Co.* (decided April 26, 1948), not yet officially reported, but published in 16 L. W. 4375, reversing S. Ct. of California, 187 P. (2d) 729; *Boston & Maine R. R.* v. *Meech*, 156 F. (2d) 109, (1 C. C. A. 1946, Cert. Den. Oct. 28,

1946) 329 U. S. 763, 67 S. Ct. 124; *Cogswell* v. *Chicago & Eastern Ill. R. R. Co.*, 328 U. S. 820, 66 S. Ct. 1122, 90 L. Ed. 945 reversing *Cogswell* v. *Chicago & E. I. R. R. Co.*, (C. C. A. 7th), 153 F. (2d) 94.

In cases above cited this Court has held that questions, such as those decided here by the Utah Court, as matters of law, are for the jury, and that the refusal of trial courts to submit such issues constitutes an abdication of the court's sworn duty to guard and protect the right of litigants, suing under the Federal Employers' Liability Act, to jury trial; that to deprive railroad workers of the benefits of this right takes from them a goodly portion of the relief afforded by Congress.

Jurisdictional Statement

(a) Jurisdiction to grant this petition is sustained by Section 237 of the Judicial Code as amended, subparagraph (b), Section 1, Chapter 229, 43 Statutes 937, Title 28, U. S. C. A., Section 344.

(b) The Statutes of the United States applied by the Supreme Court of Utah are 45 U. S. C. A., Sections 51-59; 35 Stat. 65, as amended; 36 Stat. 291, and 53 Stat. 1404.

(c) The judgment of the Supreme Court of Utah was rendered on November 29, 1947. It is set forth at R. 109-129, is not yet reported in the official Utah reports, but appears at 187 P. (2d) 188. The petition for rehearing was denied February 10, 1948 (R. 130). This petition for certiorari was filed May 10, 1948.

Questions Presented

The question presented is whether the Supreme Court of Utah properly applied the United States Statutes commonly called the Federal Employers' Liability Act, or whether the application made by it is inconsistent and in

conflict with controlling decisions of the Supreme Court of the United States. By its decision the Utah Court improperly held as a matter of law, (a) that the place where petitioner was injured while working was not a place of work, and (b) even assuming it to be a place of work, respondents were not negligent in maintaining it in an unsafe condition; (c) that there was insufficient evidence from which a jury could make a finding that switchmen and other yard employees customarily passed around the chain posts and over the plank across the wheel pit when cars were standing on Track 23½; (d) that the chains and posts around the pit, as a matter of law, constituted notice to petitioner and other employees that they should discontinue the practice of crossing over the pit on the plank, and therefore the plank from which petitioner fell was not a work place; (e) that petitioner's conduct was the sole proximate cause of his injuries.

Reasons Relied On for Allowance of Writ

The Supreme Court of Utah has decided a Federal question of substance and importance in a way not in accord with controlling decisions of this Court. It affirmed a judgment of dismissal based on a verdict directed by the trial court in an action brought under the Federal Employers' Liability Act where the evidence was clearly sufficient to supply an evidentiary basis for petitioner's cause. By its decision the Utah Court has usurped the functions of the jury contrary to repeated admonitions of this Court, and has wrongfully deprived petitioner of his right to a jury trial guaranteed by the Constitution.

It is essential that a Writ be granted in order to determine important questions relating to the construction, interpretation and application of the Federal Employers' Liability Act in Utah, and specifically to determine whether the Utah Supreme Court will be permitted to continue to

construe and apply the Federal Employers' Liability Act in a manner contrary to the controlling decisions of this Court and other Federal Courts. See *Ehalt* v. *McCarthy, et al.*, (1943), 104 Utah 110, 138 P. (2d) 639; *Pauly* v. *McCarthy, et al.*, 166 P. (2d) 501, reversed and remanded, 330 U. S. 802, 67 S. Ct. 962, 91 L. Ed. 1261; *Coray* v. *Southern Pac. Co.*, (Oct. 31, 1947), 185 P. (2d) 963, and the decision of the Utah Supreme Court in this cause.

Prayer

WHEREFORE, your petitioner prays that a Writ of Certiorari be issued out of and under the seal of this Court directed to the Supreme Court of the State of Utah commanding said Court to certify and send to this Court a transcript of the record in the case entitled Clyde Wilkerson, Appellant, v. Wilson McCarthy and Henry Swan, as Trustees of The Denver and Rio Grande Western Railroad Company, a corporation, Respondents, No. 7017, including also the proceedings in said Supreme Court to the end that said cause may be reviewed by this Court and the judgment of the Supreme Court of Utah be reversed with instructions to grant petitioner a trial by jury in the Third Judicial District Court of Utah.

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BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

Opinion of Courts Below

The trial court granted respondents' motion for a directed verdict on the 2nd day of October, 1946 (R. 8-10). The Opinion of the Supreme Court of Utah is set forth at R. 109 to R. 129, is not yet reported in the official Utah Reports, but appears at 187 P. (2d) 188.

Grounds on Which Jurisdiction of Supreme Court of the United States Is Invoked

The judgment of the Supreme Court of Utah was rendered on November 20, 1947 (R. 129). Petition for rehearing was denied on February 10, 1948 (R. 130). Petition for Writ of Certiorari was filed on May 10, 1948. The judgment of the Supreme Court of Utah is based upon its application of the United States Statute commonly called the Federal Employers' Liability Act, 45 U. S. C. A., Secs. 51-59; 35 Stat. 65, as amended; 36 Stat. 291, and 53 Stat. 1404. The jurisdiction of the Supreme Court of the United States is invoked under Section 237 of the Judicial Code, as amended by Act of February 13, 1925, c. 229, Sec. 1; 43 Stat. 937; 28 U. S. C. A., Sec. 344, and the Act of February 13, 1925, c. 229, Sec. 8; 43 Stat. 940; 28 U. S. C. A., Sec. 350.

Statement of the Case

Petitioner, an experienced switchman, sixty years of age (R. 31), was injured on the 26th day of July, 1945, as a result of falling into respondents' wheel pit at a point near the west rail of Track 23½ in respondents' coach yards as Denver, Colorado while working as a switchman (R. 34).

Petitioner brought action in the District Court of Salt Lake County, Utah. Following the presentation of evidence, the court granted respondents' motion for a directed verdict (R. 8-10), and judgment was entered against petitioner (R. 10).

Respondents were charged with negligence in failing to exercise ordinary care to provide petitioner a reasonably safe place to work. Petitioner alleged a failure to place a safe or substantial covering over the wheel pit at the point where he and other switchmen customarily crossed over the pit in the usual and ordinary performance of their duties; that the plank across the pit was loose and not firmly set or affixed or attached to the side-walls of the pit, and that due to the insecure installation of the plank, footing was unstable and the plank would and did turn and shift when a man's weight was placed upon it. Petitioner also alleged that respondents caused and permitted grease, oil and other slippery substances to accumulate and remain upon the plank, and that as he stepped upon it while crossing over the pit, due to the grease and oil and the insecure and unstable placement of the plank, he was caused to slip, lose his balance and fall to the bottom of the pit, thus sustaining the injuries complained of (R. 1-5).

When in use the pit was enclosed on three sides, north, south and west, by means of chains fastened to four corner posts (Exs. 1 and 5, R. 132A, 132B, R. 63, 64). Cars, with wheels to be removed for replacement or repair, were placed over the pit on Track 23½ to the east of the chains and posts. Track 23½ extends through a portion of the yards in a northerly and southerly direction. The wheel pit passes under Track 23½ and other switch tracks and extends through a portion of the yards in an easterly and westerly direction. It has cement walls and floor (R. 34, 61).

The following measurements are deemed pertinent in discussing the facts pertaining to petitioner's accident:

1. Width of cover board (on which petitioner slipped)—22 inches.
2. East edge of cover board is west of easternmost chain posts—9½ inches.
3. East chain posts are west of west rail—36 inches.
4. Width of the wheel pit—4 feet, 2½ inches.
5. Depth of the wheel pit—10 feet, 7 inches.
6. From edges of the wheel pit to their closest chain posts—19 inches.
7. From east safety chain posts to west safety chain posts—16 feet, 5½ inches.
8. From northeast safety chain post to southeast safety chain post—7 feet, 6 inches.

(R. 57-59, 61, 62, 64-67.)

At the time of the accident a tourist sleeper car was standing on Track 23½ over the wheel pit (R. 34, 41). The vertical distance between the car body and the rail was 44 inches (R. 65), the height of the rail was 7 inches above the ties (R. 65). The post being 42 inches in height, the distance between the top of the post and the car body was 9 inches vertically, and laterally from the outermost portion of the car body to the post, 7 inches (R. 59, 65, 67). The post leaned slightly to the west (R. 59). There was considerable free space underneath the car body extending down to the roadbed (R. 66, 67). The posts were removable from the metal tubing imbedded in cement into which they were placed when in service and it is a fair inference that there was some play between posts and tubing (R. 64). Two planks were across the wheel pit when petitioner was injured, one immediately to the west of the west rail, a space of approximately 18 inches separated it from the other plank. The easterly edge of the latter plank was 9½ inches west of the post. Petitioner fell from the second plank. This plank was 22 inches in width, 4 feet 2½ inches in

length, constructed of several boards bolted together and weighed approximately 75 pounds (R. 51, 57, 88).

The locus of the accident and all of the physical facts as above set forth are clearly illustrated by the model (Respondents' Exhibit No. 2, and the photographs, Exhibits No. 1 and 5, R. 132A, 132B).

Petitioner was engaged in the performance of his duties as engine foreman at the time of his injury. His shift was from 7:00 a.m. to 7:00 p.m. His crew, in addition to himself, consisted of two switchmen, an engineer and fireman (R. 32). The crew worked under petitioner's direction (R. 32); their work was switching passenger cars in the coach yard and spotting cars to be repaired over the wheel pit or at such other points as designated (R. 32).

On the morning of the accident at about 7:30 or 8:00 o'clock a.m., petitioner received instructions to spot a tourist sleeper on Track 23½ so the car men could change a pair of wheels (R. 34). At that time the safety chains were up (R. 36, 37). The pit was then uncovered with the exception of the plank immediately adjacent to the west rail of the track and the plank from which petitioner later fell (R. 36). Petitioner was on the east side of the car when it was spotted. Immediately thereafter, he crossed the wheel pit by passing over the plank from which he later fell (R. 37). A few minutes prior to the accident petitioner went to the battery house, located to the north of the wheel pit, for a drink of water, he then returned to the pit. He walked along the west side of the tourist sleeper looking for a Mr. Hawkins, the man in charge of the car repairmen working in the pit, "to see if he was through with this particular car so the car could be moved and I could go get another bad order car that I knew they were in a hurry for and spot it for him, so he could get the other car done for our noon—for a two o'clock train, I believe it was wanted for" (R. 42).

As petitioner was crossing over the pit he fell. In describing the occurrence he stated (R. 41):

> "A. • • • I started coming around the chain, put my right hand on the top of the post came around the chain and turned around and started to cross the cover board, putting my right foot on the cover board. As I did so, this board felt to me like there was a little rock or gravel which caused it to tip under the weight of my foot, starting my foot to slide and away I went to the bottom of the pit. • • •" (R. 41).

He fell to the west of the plank but it remained in place (R. 50, 52).

The posts and chains along the wheel pit had been installed in February or March of 1945 (R. 73). The testimony was conclusive that car repairmen, switchmen and trainmen customarily walked over the plank in crossing the pit when the chains were up, as petitioner was doing when injured (R. 17, 18, 22, 37-39, 54).

Arbogast, a switchman of twenty-six years experience, working in the coach yards at the time of trial and who had worked there both before and after the chains and posts were installed, and exceptionally well acquainted with the locus of the accident, testified (R. 17, 18):

> "Q. And what have you noticed with reference to the practice of men passing between the standing cars on 23½ and the posts that hold the safety chains?
>
> "A. Well, they would walk through and get on the board and walk to and from each side, and the men that work on the pit work on that board, and sometimes set on the board next to the—in next to the car there to perform their work, you know, like where they are up under, or working on the car, they use the board over from it to work on" (R. 17).
>
> • • • • • • •
>
> "Q. And what can you say with reference to the—such occurrences, as to how often they happen?

"A. Oh, I would judge that I saw the men pass through there dozens of times. * * * you would see them walking numerous times, number of times, you know" (R. 18).

Mr. Arbogast had held the same job petitioner was holding when injured. He placed cars over the wheel pit and removed them every day in the performance of his duties (R. 18). He testified concerning his own practice (R. 18):

"A. When I have occasion to pass through there, I put my hand on the post, step over on the board, and go around the other post, and that is the way I pass to and from on the pit" (R. 18).

Petitioner testified (R. 38):

"Q. I will ask you to state whether or not you observed any practice with reference to crossing over the pit when men were working on the cars there in the daytime before these chains were installed?

"A. Walked right straight across the board.

"Q. Was there a board usually there to walk over?

"A. Yes, sir.

"Q. *Was there any change in that practice after the chains were installed?*

"A. None, only they had to walk around the chains.

"Q. At any time while you were working in the yards there before you were injured, did you ever receive any instructions from anyone forbidding you to cross over the pit?

"A. No, sir.

"Q. You may state whether or not you observed men cross over the pit as you have indicated here on more than incidental occasions.

"A. Yes, sir.

"Q. *What did you observe with reference to the number of times the occasion when men would cross over the pit?*

"A. *Oh, I couldn't say; I suppose maybe a hundred times; varies, men, both switchmen and car men or*

others working there in the yard necessary, pullman employees and so forth.

"Q. *Crossed over the pit?*

"A. *Yes, sir, it was a common practice for everybody to use that that way*" (R. 38).

There was evidence to support petitioner's contention that the plank tilted and that he slipped on what he believed to be a greasy substance on the plank.

Hawkins testified that there was no practice of cleaning the plank and that it was cleaned only once in a period of two years. He testified that car repairmen working in the wheel pit sometimes got grease on their shoes and that the grease came off onto the plank (R. 89-91). Petitioner had observed grease on the plank earlier that morning (R. 39), and saw grease on the plank when he fell (R. 98).

As illustrating the attitude of the Utah Court in determining the facts and showing the extent to which it went in resolving all issues against petitioner, we quote the following from the opinion (R. 116):

> "* * * The construction of the enclosure was such that with a standard tourist car there was not to exceed seven inches in clearance between the overhang of the car and the guard post. On wider cars, the clearance was less. To an ordinary reasonable person it was obvious that the railroad company had intended to close this pathway to all traffic crossing the pit. There just would not be any sense or logic in forcing plaintiff to go to the extent of literally squeezing himself between the post and car if it were intended to permit his continued use of the crossing." (R. 116)

This statement is not only inaccurate, but is contrary to the evidence. Exhibit No. 1, R. 132A, clearly reveals that no such physical contortions, as described by the court, are necessary in passing around the post. The testimony of petitioner, Arbogast and Hawkins indicate that there is

sufficient space for large men to pass with ease between the post and a car on the track. Hawkins, who weighed 250 pounds, testified that he could pass between the post and a car standing on the track (R. 84, 96, 97). Arbogast, who weighed 176 pounds and was 6 feet 2 inches in height, testified that he could do it with ease (R. 39, 104). Petitioner was much smaller than either of these men and, of course, would have no difficulty in passing between the post and a car on the track (R. 97). This is true because the top of the post is considerably lower than the car body.

Specification of Errors

The Supreme Court of Utah committed prejudicial and reversible error:

1. In affirming the trial court's ruling granting respondents' motion for a directed verdict and causing judgment to be entered accordingly;

2. In holding as matter of law that the place where petitioner was injured while working was not a place to work;

3. In holding as matter of law that respondents were not negligent in failing to exercise ordinary care to furnish petitioner a reasonably safe place to work;

4. In usurping the function of the jury in determining proximate cause as matter of law.

ARGUMENT

Point I

The Supreme Court of Utah erred in affirming the trial court's ruling granting respondents' motion for a directed verdict and causing judgment to be entered accordingly.

There was adequate and sufficient evidence to show that the plank from which petitioner fell and received his injuries was provided by respondents as a walkway for peti-

tioner and other employees in the performance of their duties, and was customarily so used by switchmen and other employees, and that the usage of the plank for that purpose was of such duration and nature as to afford ample notice of the fact to respondents.

There was adequate and sufficient evidence to demonstrate that the plank, as constructed and maintained, constituted a dangerous and unsafe place of work for petitioner and his fellow employees. The trial court, therefore, erred in granting respondents' motion for a directed verdict and the Supreme Court of Utah erred in affirming the trial court's ruling. The ruling of the Supreme Court of Utah is contrary to and in conflict with the controlling decisions of this Court in the cases cited at page 2 of the Petition for Writ of Certiorari.

"Where there is an evidentiary basis to support a verdict the appellate court's function is exhausted when that evidentiary basis becomes apparent, it being immaterial that the court might draw a contrary inference or feel that another conclusion is more reasonable." "Only when there is a complete absence of probative facts to support the conclusion reached does a reversible error appear." *Lavender* v. *Kurn*, 327 U. S. 645, 66 S. Ct. 740, 90 L. Ed. 692.

Questions of negligence under proper charge from the court should be submitted to the jury for their determination, so long as the jury system is the law of the land and the jury is made the tribunal to decide disputed questions of fact. *Tiller* v. *Atlantic Coast Line R. Co.*, 318 U. S. 54, 87 L. Ed. 610, 63 S. Ct. 444.

To deprive railroad workers of the benefits of jury trial in close or doubtful cases is to take away a goodly portion of the relief which Congress has afforded them. *Bailey* v. *Central Vermont R. R. Co.*, 319 U. S. 350, 87 L. Ed. 1444, 63 S. Ct. 1062.

The choice of conflicting versions of the way an accident happened and the inferences to be drawn from uncontroverted as well as controverted facts, are questions for the jury. Once there is a reasonable basis in the record for concluding that there was negligence which caused the injury, it is irrelevenat that fair-minded men might reach a different conclusion. For then it would be an invasion of the jury's function for an appellate court to draw contrary inferences or to conclude that a different conclusion would be more reasonable. *Ellis* v. *Union Pacific R. R. Co.*, 67 S. Ct. 598, 329 U. S. 649.

It is not the function of a court to search the record for conflicting circumstantial evidence in order to take the case away from a jury. The jury is the fact-finding body and the very essence of its function is to select from among conflicting inferences and conclusions that which it considers most reasonable. *Tennant* v. *Peoria and Pekin Union R. Co.*, 321 U. S. 29, 64 S. Ct. 409, 88 L. Ed. 520.

The Federal Employers' Liability Act is not to be narrowed by refined reasoning or for the sake of giving "negligence" a technically restricted meaning. It is to be construed liberally to fulfill the purposes for which it was enacted, and to that end the word may be read to include all the meanings given to it by courts, and within the word as ordinarily used. *Jamison et al.* v. *Encarnacion*, 281 U. S. 635, 50 S. Ct. 440 at page 442.

Point II

The Supreme Court of Utah erred in holding as matter of law that the place where petitioner was injured while working was not a place to work.

The first reason advanced by the Supreme Court of Utah for its holding that the place where petitioner was working when injured was not a place of work, was that the posts

and chains constituted adequate and sufficient notice to employees not to cross the wheel pit over the plank. The Court stated (R. 115):

> "• • • However, defendants, nearly three months before the accident, attempted to stop this practice by enclosing the pit. This is not the case in which an employer attempts to stop an unsafe practice by publishing written notice to employees to discontinue. No rules or regulations to prohibit the practice were promulgated. Instead, the defendants adopted a different, and we think a more effective method of notifying employees generally in the yard to stop the practice of crossing the wheel pit. They blocked the path." (R. 115)

And again (R. 117):

> "• • • Accordingly, we hold that the installation of the chain and posts was notice by defendants to all employees generally in the yard that the board was not to be used as a walk-way for crossing the pit." (R. 117)

The holding of the court is based on an inference unwarranted by the evidence. Petitioner testified as to the purpose of the guard chains as follows (R. 101):

> "Q. Mr. Wilkerson, what are these guard chains up here for in your understanding?
> "A. To keep people from walking directly into the open pit.
> "Q. To keep people from falling into the pit?
> "A. Yes, sir." (R. 101)

Respondents have never denied that car men used and maintained the plank over the pit as a walkway. The evidence is without conflict that no signs were posted, no rules or regulations promulgated, no instructions given forbidding the use of the plank by switchmen and other workmen as a walkway.

The Supreme Court of Utah has refused to abdicate the position taken by it in *Pauly* v. *McCarthy, et al.*, 109 Utah 398, 166 P. (2d) 501. This Court granted certiorari in that case, 329 U. S. 698, 67 S. Ct. 102, 91 L. Ed. 609, and reversed without opinion, 330 U. S. 802, 67 S. Ct. 962, 91 L. Ed. 1261.

Here again the Utah Court repeats the reversible error made in the *Pauly* case by holding that the place where respondents' employees worked was not a place to work and hence there was no duty to maintain it in a reasonably safe condition for its foreseeable use (R. 123).

The Utah Court reaffirmed the erroneous holding made by it in the *Pauly* case by holding that the place where petitioner was working when injured was not a place to work because respondents, as matter of law, could not be required to anticipate that their employees would work where they worked (R. 115, 123).

The above court-made finding of absolute non-existence of duty to foresee or anticipate the use of the plank as a walkway was based upon a supposedly implied notice to discontinue such usage. The implied notice was clearly ineffective inasmuch as the employees completely disregarded it as such and continued to use the place as a place of work as they always had done before. The Utah Court concedes that there was testimony to this effect (R. 112):

> "Plaintiff testified that prior to installation of the safety chains it was the practice of the men working generally in the yard to cross the wheel pit by means of the permanent board, and that there was no change in this practice after the chains were put up, other than that the men had to go around the post and between it and the side of the car standing on the track." (R. 112)

See also testimony quoted by the Utah Court at R. 118. Petitioner was corroborated in this by the testimony of Arbogast (R. 17, 18, 22).

The evidence clearly demonstrated that this so-called implied notice to refrain from using the permanent plank as a walkway was completely ineffective and that the placing of the posts and chains was never regarded by switchmen as notice to discontinue the practice of crossing over the pit on the plank. The Utah Court conceded that the installation of the posts and chains was not notice to respondents' employees working in the pit.

Just why the pit men "had" to use the plank and the petitioner "had" to go around the pit or stay away from it is not readily perceptible. The pit men undoubtedly could have gone around the pit also.

How were petitioner and other employees to know that the installation of the posts and chains was special notice to them to discontinue the practice of crossing over the pit on the plank? Looking at this situation from a practical standpoint one can understand why this so-called implied notice was ineffective. The plank had been used as a means of crossing over the pit ever since the pit was constructed. After the chains were installed the men working in the pit continued to use the plank as a walkway. Other employees in the yard likewise used it. It is fair to assume that all employees having duties to perform in the vicinity of the wheel pit continued to use the plank as a passageway after the posts and chains were installed. Is it reasonable to infer that a switchman observing the chains would conclude "I am not employed as a car man, hence I am not to use the plank as car men use it"?

If the installation of the posts and chains was an implied warning or notice of anything, it was nothing more than a warning or notice that when the chains were up the pit was uncovered and persons working around or near it should take heed of that fact.

The Supreme Court of Utah not only held that the posts and chains constituted adequate notice that the plank should

not be used as a walkway, but that such notice constituted a sufficient and adequate performance of respondents' duty to exercise ordinary care to furnish switchmen a reasonably safe place to work.

Withdrawn from jury consideration were all questions as to whether the duty to exercise ordinary care required that proper signs be posted or a rule or order forbidding use of the plank as a walkway be published, and this, in spite of the undisputed evidence that both before and after installation of the chains and posts, the plank was used as a walkway by car men, switchmen and other railroad employees engaged in the performance of their duties.

This Court stated in *Ellis* v. *Union Pacific R. R. Co.*, 67 S. Ct. 598, that:

> "• • • the inferences to be drawn from uncontroverted as well as controverted facts, are questions for the jury."

The Utah Court has defeated petitioner here by drawing unfavorable inferences against him and disregarding those favorable to him. The court well might have inferred that the posts and chains constituted warning to strangers only, or that the posts and chains constituted warning to strangers and employees whose business did not require their presence near or about the pit, or that the chains were placed in position as protective devices to save persons from falling into the pit when open (petitioner's view as to the purpose of the chains and posts), but the court, contrary to unquestioned law, selected the inference most *unfavorable* to petitioner's cause and based its decision thereon.

The second reason advanced by the Supreme Court of Utah for its holding that the place where petitioner was working when injured was not a place of work was that the evidence was inadequate and insufficient to support a finding that switchmen and other yard employees customarily

passed around the chain posts and crossed over the plank when cars were at the wheel pit. The majority opinion stated (R. 122):

> "* * * It must be conceded that if defendants knew or were charged with knowledge that switchmen and other workmen generally in the yard were habitually using the plank as a walkway in the manner claimed by plaintiff, then the safety enclosure might be entirely inadequate, and a jury question would have been presented on the condition of the board and the adequacy of the enclosure."

It is apparently conceded by the court that if there had been an evidentiary basis for a finding that the custom and practice of switchmen using the plank as a walkway existed, then the adequacy of the enclosure, and the condition of the plank itself would become questions for the jury. Such an evidentiary basis was adequately supplied by the testimony.

For years previous to the installation of the posts and chains, car men, switchmen, trainmen and other of respondents' employees had habitually and customarily used the plank across the pit as a walkway (R. 22, 38). The chains and posts had been up about three months prior to the accident and petitioner testified that there was no change in practice after the chains were installed (R. 38). Petitioner had seen switchmen, car men and pullman employees use the plank in the same manner as he was using it when injured "maybe a hundred times." (R. 38). "It was a common practice for everybody to use that that way" (R. 38).

If the Utah Supreme Court's finding is based on the fact that an insufficient period of time had elapsed since the chains and posts were installed for the establishment of a custom, then what amount of time is required for a custom and practice to become fixed so as to charge respondents with notice of its existence? Is this not a matter upon

which reasonable minds might differ? The custom of using the plank as a walkway was of long duration, it continued without interruption after the chains and posts were placed in position. How many times must switchmen walk across a plank before a custom and practice comes into existence? A hundred times? A thousand times? Ten thousand times? This would seem to be a proper question for the jury. If petitioner saw switchmen, car men and pullman employees use the plank as a walkway a hundred times it could be fairly inferred that such employees so used it a great many times when petitioner was not present, yet the holding of the Utah Supreme Court was based on the court-made finding that there was no evidentiary basis for petitioner's contention that switchmen customarily used the plank as a walkway when the posts and chains were up. Certainly a jury could well find that respondents' so-called implied notice was entirely inadequate to change the existing custom of crossing the pit by walking over the plank.

In the case of *Winegar* v. *Oregon Short Line R. Co.*, 77 Utah 594, 601, 298 P. 948, plaintiff brought action under the Federal Employers' Liability Act to recover damages for personal injuries sustained in the course of his employment, and alleged that it was the "custom, practice and usage in the switch yard of the defendant that, whenever a crew of men were engaged in inspecting, checking, and repairing a string of cars on one of the switch tracks, no car or cars would be run in on an adjoining track without notice or warning thereof to the employees so engaged." Defendant denied the existence of the alleged custom and practice, and the existence of such custom or practice became the controlling question of fact at the trial and on appeal, the sole question being whether the evidence in respect to custom and practice was sufficient to sustain the verdict. Plaintiff and one other witness testified as to the existence of such custom and practice and defendant introduced fifteen wit-

nesses who testified that no such custom or practice existed or prevailed in defendant's yards. The court, however, sustained the verdict for plaintiff.[1]

We believe that the Supreme Court of Utah's decision in this case if followed would place upon a party endeavoring to prove the existence of a custom and usage the burden of establishing such custom and usage as had "obtained the force of law."

Respondents successfully urged the trial court and the Supreme Court of Utah to accept the proposition that the plank was a walkway for car men but not for switchmen. There is no evidence of a rule to that effect. There is no evidence from which such a rule can be inferred.

A third reason advanced by the Supreme Court of Utah for its holding that the place where petitioner was working when injured was not, as to him, a place of work, was that there were other safer ways that he could have adopted in crossing the pit. Whether or not petitioner could have performed his duties by adopting other and safer methods could be considered only in connection with the question of

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[1] "Counsel for the defendant by the authorities cited in that connection, insist that it was incumbent on the plaintiff to show such a custom or usage which has obtained the force of law. With this view we do not concur. * * *"

* * * * * * *

"Counsel for defendant, referring to the number of witnesses called in defendant's behalf, argues: 'There could of necessity be no custom here in the matter of switching cars unless such custom was known by the switchmen and acted upon by them. A custom could not be made or established by one or two employees when all the other employees knew nothing about it.'

"We see no objection to this as a statement of substantive law, but it certainly cannot be seriously urged that the testimony of the switchmen and engine foremen must be taken as conclusive as to the fact of whether they did or did not know of such a practice, or whether they had or had not given such notice or warning. The jury was not obligated to believe the witnesses for the defendant as against substantial evidence in behalf of the plaintiff of the existence of the alleged practice. It is

his own negligence. A very recent and enlightening opinion on this point is *Ellis* v. *Union Pacific Railroad Company, supra.* This Court granted certiorari in that case because of an apparent conflict between the decision of the Nebraska Supreme Court and the opinion of the United States Supreme Court in *Lavender* v. *Kurn, supra.* Ellis based his action upon an alleged failure of the defendant to furnish him a safe place to work. The evidence was conflicting, but this Court determined that evidence and favorable inferences were sufficient to furnish an evidentiary basis for the verdict, and the judgment of the Supreme Court of Nebraska was therefore reversed.[2]

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obvious that the jury believed the testimony of the plaintiff and his witnesses in respect to such custom and practice, as it was within its power to do.

"A very similar situation, and one involving the identical question on principal, was before the Circuit Court of Appeals, Eighth Circuit, in the case of St. Louis & S. F. Ry. Co. *v.* Jeffries, 276 F. 73. Two or three witnesses for the plaintiff testified that there was such a custom, while six or seven witnesses for the defendant testified that there was not. It was urged by defendant, that there was absolutely no evidence to disprove the positive testimony of some of the defendant's witnesses who stated they had not observed any such custom; therefore it was further urged there was uncontradicted evidence that the custom of which plaintiff's witnesses testified was not uniform, and hence not binding, thereby making the existence of the custom a question of law.

"The court held that such a position would render it impossible to ever establish a custom of some witness whose orthodoxy in telling the truth would permit him to deny that there was such a custom as claimed, for, if the proposition is sound, it must be just as sound with one witness as seven. Because certain witnesses testified they had not observed any custom, it cannot be maintained that there is uncontradicted evidence that the custom was not uniform, in view of the testimony of the plaintiff and his witnesses in that respect. We think this case is controlling on the question before us." *Winegar* v. *Oregon Short Line R. Co.*, 77 Utah 594, 298 P. 948.

[2] "From this evidence the jury might have concluded that petitioner had a safe place to work but elected to choose a dangerous one, that any duty of warning was fully discharged by the presence of the sign, and that the engineer had not been negligent in any way. In that view of the case the accident would be an unforeseeable, freak event or one caused solely by petitioner's own negligence. On the other hand, it would not have been unreasonable for the triers of fact to have inferred that it was

In this case petitioner was no sight-seer. He was engaged in the actual performance of his duties under his employment when injured. He approached the pit in search of the car foreman for the purpose of ascertaining when the car could be moved. It is true that he could have watched and waited until the blue flag was removed, or he could have approached the pit from another direction, but in conformity to custom and usage he chose to cross the plank *provided as a walkway.*

Surely a jury could have properly found and inferred from the evidence that petitioner was acting according to well-established custom and practice in using the plank as a walkway over the pit.

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proper and usual procedure to work on the right side of the engine, that the hazard was not readily apparent and was almost in the nature of a trap, that while the sign was placed so as to be readily visible from a train, it was insufficient warning to a man on the ground, and that consequently petitioner was not furnished a safe place to work. And the jury might have thought that the engineer was negligent in failing to perceive the peril in time to avert the accident by a warning or by stopping the engine. Again, both parties might have been found negligent, in which event it would have been the duty of the jury, as the trial judge charged, to render a verdict based upon the damages caused by respondent's negligence diminished by the proportion of negligence attributable to petitioner. 45 U.S.C. Sec. 53, 45 U.S.C.A. Sec. 53.

"The act does not make the employer the insurer of the safety of his employees while they are on duty. The basis of his liability is his negligence, not the fact that injuries occur. And that negligence must be 'in whole or in part' the cause of the injury. 45 U.S.C., Sec. 51, 45 U.S.C.A. Sec. 51. Brady *v.* Southern Ry. Co., 320 U. S. 476, 484, 64 S. Ct. 232, 236, 88 L. Ed. 239 Whether those standards are satisfied is a federal question, the rights created being federal rights. Brady *v.* Southern Ry. Co., supra; Bailey *v.* Central Vermont Ry. Co., 319 U. S. 350, 63 S. Ct. 1062, 87 L. Ed. 1444.

"The choice of conflicting versions of the way the accident happened, the decision as to which witness was telling the truth, the inferences to be drawn from uncontroverted as well as controverted facts, are questions for the jury. Tennant *v.* Peoria & P. U. R. Co., 321 U. S. 29, 64 S. Ct. 409, 88 L. Ed. 520; Lavender v. Kurn, supra. Once there is a reasonable basis in the record for concluding that there was negligence which caused the injury, it is irrelevant that fair-minded men might reach a different conclusion. For then it would be an invasion of the jury's function for an appellate court to draw contrary inferences or to conclude that a differ-

Point III

The Supreme Court of Utah erred in holding as matter of law that respondents were not negligent in failing to exercise ordinary care to furnish petitioner a reasonably safe place to work.

In determining whether the place where petitioner was injured was safe, all safety precautions, if any, taken by the respondents and all precautions which might have been taken by them must be considered and "We must assume the most favorable statement of plaintiff's case to be true. • • •" Mr. Justice Holmes in *Texas and Pacific Ry. Co.* v. *Behymer*, 189 U. S. 469, 23 S. Ct. 622.

In *Bailey* v. *Central Vermont Ry. Inc., supra*, the Court said:

> "The nature of the task which Bailey undertook, the hazards which it entailed, the effort which it required, the kind of footing he had, the space in which he could stand, the absence of a guard rail, the height of the bridge above the ground, the fact that the car could have been opened or unloaded near the bridge on level ground—all these were facts and circumstances for the jury to weigh and appraise in determining whether respondent in furnishing Bailey with that particular place in which to perform the task was negligent."

So too, in the case at bar, the manner in which the chain posts were erected, the clearance between the posts and the side of the car on Track 23½, the efforts required of peti-

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ent conclusion would be more reasonable. Lavender v. Kurn, supra, 327 U. S. at page 652, 66 S. Ct. at page 743. And where, as here, the case turns on controverted facts and the credibility of witnesses, the case is peculiarly one for the jury. Washington & Georgetown R. Co. v. McDade, 135 U. S. 554, 572, 10 S. Ct. 1044, 1049, 34 L. Ed. 235; Tiller v. Atlantic Coast Line R. Co., 318 U. S. 54, 68, 63 S. Ct. 444, 451, 87 L. Ed. 610, 143 A.L.R. 967.

"We think the evidence raised substantial questions for the jury to determine and that there was a reasonable basis for the verdict which it returned." *Ellis* v. *Union Pac. Co.*, 329 U. S. 649, 67 S. Ct. 598, 600.

tioner in passing around the post in order to reach the foot-walk, the width of the foot-walk, the presence or absence of grease on the walk or of a pebble under it, were all factual questions to be considered by the jury in determining whether or not the place where petitioner was working when injured was reasonably safe.

The Supreme Court of Utah realized that the plank, as a walkway, was unsafe, dangerous and inadequate. The majority state (R. 116):

> "• • • Chains running parallel with the plank might have been helpful, but chains running at right angles to the plank could be of no assistance, rather they would be an extra hazard." (R. 116)

• • • • • • •

And at R. 117:

> "• • • In this particular case, the board appears adequate for the use of the pit crewmen, but entirely inadequate if intended to be a cross-walk for other employees. Employees climbing in and out of the pit approach more deliberately, use other and different hand holds, and are more careful of their footing, while employees swinging on to the plank in a hurry are apt to forget about the slippery condition of an oily board and forget about the dangers incident to crossing, as did the plaintiff, who swung himself around the chain post and onto the plank." (R. 117)

The complete disregard of the rule giving petitioner the advantage of the most favorable statement of the case possible under the evidence is clearly revealed in the court's discussion of the evidence with respect to the customary usage of the plank as a walkway. After setting forth petitioner's testimony, the Court states (R. 118, 119):

> "It will be noted from this testimony that it is in no way limited as to dates or employees. The witness

could have been talking about the time before the chains were installed, the time after the chains were installed, or both. If we assume the most favorable version to the plaintiff, this would establish the time as after the chains were installed, but there is no way of telling how much of the use must be credited to the car or pit men, who were constantly using the board in connection with their duties, and how much of the use was chargeable to the switchmen." (R. 118)

And after stating a portion of the testimony of petitioner's witness Arbogast, the Court states (R. 119):

"An examination of this evidence shows the witness could identify two switchmen who crossed the plank during the three months period, but it is entirely lacking in those elements necessary to show acceptance of a custom or practice by acquiescence. The use by employees other than the two is confused between the times before and the times after the installation of the safety chains." (R. 119)

The Court entirely disregarded and overlooked the following testimony of Arbogast on this question (R. 18):

"Q. And what can you say with reference to the—such occurrences, as to how often they happen?

"A. Oh, I would judge that I saw the men pass through there dozens of times. I worked there and I go to work at three o'clock, and the men doesn't quit until four, and the pullman company, they have their work done on that pit, the Rio Grande Company does their work there nearly all the time. All through the war, they were fixing cars and I go to work and I am the only engine—that is my regular work, the coach yard engine, and I would always do that particular work. You know, what was to do after three o'clock, and it would—you know men work with you, you would see them walking numerous times, numbers of times, you know." (R. 18)

It is respectfully submitted that the Supreme Court of Utah has judicially usurped the powers and functions of the jury in drawing the unfavorable inferences of fact above set forth and that in so doing the court has deprived petitioner not only of his right to favorable inferences, but of his right of trial by jury as well. The majority declare (R. 120):

> "* * * The evidence of plaintiff, at the most, established a questionable, sporadic and occasional use of the board in the manner contended for by him, and for a short period of time. This is not sufficient to charge the appellants with notice of the unsafe practice. The evidence falls short of that required to establish a presumption that the defendants had consented to or acquiesced in the improper use of the board as a pathway." (R. 120)

It is submitted that this holding indicates and illustrates a determination on the part of the court to draw from conflicting evidence all inferences necessary for the support of its opinion. The testimony clearly indicated that this plank had been used as a pathway over the wheel pit ever since the pit was constructed; that its use as such was in no way interrupted by the installation of the posts and chains. Petitioner and his crew continued to use it without interruption, as did Arbogast and his crew. How then can the court in justice and fairness to petitioner and in justice and fairness to its oath to guard and protect litigants in the enjoyment of their right of trial by jury in actions brought under the Federal Employers' Liability Act, declare that at most petitioner's evidence established a questionable, sporadic and occasional use of the board in the manner contended by him. This holding alone should require reversal. Again the Court states (R. 123):

> "* * * In this case the defendants had no knowledge, actual or constructive, that switchmen were using the

plank to carry out their tasks, and therefore, they were only required to keep the board safe for the purposes of the pit crewmen." (R. 123)

Where the court finds support for this statement, we do not know. Two of respondents' engine foremen testified to the contrary, petitioner and Arbogast. They testified positively that they themselves continued to use this plank as a walkway after the posts and chains were installed, and that they had seen it so used by their crews and other switchmen and other employees of the respondents. Is it necessary for petitioner to put in the record the affirmative testimony of all the company officials before he is permitted to claim that knowledge of usage has been brought home to the company? It would seem that the evidence of knowledge of usage on the part of the company was conclusive. Certainly an assertion by petitioner that a jury question was presented on this issue is less than he might well claim in view of the evidence.

The dissenting opinion clearly reveals many of the fallacies of reasoning and inference found in the majority opinion. At R. 126, 127 appears the following pertinent statement:

> "* * * Under these circumstances, since the danger in doing so without stopping to consider the possibilities is not apparent, and since human experience teaches that busy men do often take such chances, in my opinion the defendants had they acted as ordinary, prudent men, would have anticipated that the plaintiff and the other employees who were similarly situated would continue to use this board to cross the pit just as they had used it before the chain was placed there. To me it seems that this is the thing that you would naturally expect them to do." (R. 126, 127)

Also at R. 128:

> "* * * I think the evidence is sufficient from which the jury could reasonably find that such employees

had continued to so use this board after the chain was placed around the pit the same as they used it before so as to notify the defendants of such use and that in view of such use this was an unsafe place to work. In my opinion neither the record nor the extracts therefrom quoted in the prevailing opinion can be read without concluding that plaintiff and his witness were positively testifying that after the chain was placed there, plaintiff and his crew and the other employees similarly situated continued to use this board to cross the pit whenever it was convenient for them to do so, as they did prior to the placing of the chains, and that neither of them receded from this positive testimony or testified contrary thereto on cross-examination." (R. 128)

In the case of *Boston & M. R. R.* v. *Meech*, 156 F. (2d) 109 Cert. Den. Oct. 28, 1946), 329 U. S. 763, 67 S. Ct. 124, the eceased was performing the job of stripping engines. He as working on a structure just outside the engine house nown as the washstand, which consisted of two parallel ooden platforms. At the time of his death he was standng near the northerly edge of the southerly platform in the ath of, but oblivious to the approach of the locomotive hich killed him. The case was tried on two counts, the rst being negligent operation of the locomotive, and the econd, which interests us here, being failure to provide a easonably safe work place. The Court said:

"The sufficiency of the evidence to support the verdict on the second count is at least equally clear. The defendant might have painted lines on the platforms of its washstand to indicate the extent to which locomotives overhang them, and thus to warn persons on the platforms of the danger incident to standing near their inner borders, or it might even have set the platforms of its washstand back from the tracks far enough to prevent locomotives from overhanging them at all.

"From the foregoing, it is clear that although some precautions were taken for the decedent's safety,

> further precautions were possible, and from this it follows, as we read the decisions cited above, that there was an 'evidentiary basis' for submitting the issue of the defendant's causal negligence to the jury, and hence that our 'function is exhausted,' Lavender *v.* Kurn, et al., *supra*, (66 S. Ct. 744). Also we think it evident from what we have said that although the decedent could readily have taken more care than he did for his own safety either by standing back from the edge of the platform, or by watching more closely for locomotives coming in from the yard, or by standing on the northerly platform upon which his presence would normally be anticipated and where he would be in the hostler's range of vision from the engineer's seat, still we cannot say that as a matter of law his carelessness was the sole proximate cause of the accident."

Petitioner being entitled to the benefit of all favorable inferences reasonably deducible from the evidence, it may not be amiss to consider what could have been done by the respondents to make the wheel pit and the cross-walk safer for foreseeable use. *Boston & M. R. R.* v. *Meech*, 156 F. (2d) 109 (1 C. C. A. 1946, Cert. Den. Oct. 28, 1946), 329 U. S. 763, 67 S. Ct. 124.

(1) The eastern chain posts could have been placed two or three feet to the west so as to alleviate the necessity of swinging around the posts in order to reach the plank.

(2) The space betwen the plank next to the west rail of Track 23½ and the plank on which the petitioner slipped, could have been covered, giving a wider and better footing.

(3) The plank on which petitioner slipped and fell could have been placed against the plank next to the west rail of Track 23½, giving a wider and better footing.

(4) A wider plank could have been placed across the pit.

(5) Signs prohibiting crossing could have been placed near the pit.

(6) Respondents could have adopted the practice of leaving the posts and chains down during daylight hours when danger of falling into the pit was nil.

(7) Respondents could have adopted the practice of removing the plank on which petitioner slipped when the other planks were removed from over the pit while car men were working therein, thus completely eliminating the unsafe passageway.

Point IV

The Supreme Court of Utah usurped the function of the jury in determining proximate cause as matter of law.

Respondents urged at the trial and on appeal to the Utah Supreme Court that the petitioner's own negligence was the sole proximate cause of his injuries, entirely overlooking abundant evidence that by custom and usage the plank had became a walkway over the pit for switchmen and other employees.

The holding on the question of proximate cause is in conflict with *Tennant* v. *Peoria & Pekin Union R. Co., supra.* There the question was whether the failure to give warning of the intended movement of a train could be found by the jury to be a proximate cause of Tennant's death. The Court, at page 34 of 321 U. S. and page 524 of 88 L. Ed., and page 412 of 64 S. Ct. said:

> "* * * The ultimate inference that Tennant would not have been killed but for the failure to warn him is therefore supportable. The ringing of the bell might well have saved his life. The jury could thus find that respondent was liable 'for * * * death resulting in whole or in part from the negligence of any of the * * * employees.'"

A jury could reasonably find that the location and condition of the plank as a walkway contributed to the cause of

petitioner's injuries. If the walkway had been properly installed and maintained, petitioner, in all probability, would not have fallen therefrom. The ultimate inference that petitioner would not have been injured but for the failure to properly install, equip and maintain the walkway is therefore supportable. Proximate cause is ordinarily a question for the jury. *Lavender* v. *Kurn, supra; Bailey* v. *Central Vermont R. R. Co., supra; Tennant* v. *Peoria & Pekin Union R. Co., supra; Illinois C. R. Co.* v. *Skaggs*, 240 U. S. 66, 36 S. Ct. 249, 60 L. Ed. 528; *Union Pacific R. Co.* v. *Hadley*, 246 U. S. 330, 38 S. Ct. 318, 62 L. Ed. 751; *Spokane & Inland Empire R. R. Co.* v. *Campbell*, 241 U. S. 497, 36 S. Ct. 683, 60 L. Ed. 1125.

This Court in the case of *Pauly* v. *McCarthy, et al., supra*, reversed a holding of the Utah Supreme Court that a railroad's failure to make a bridge within the limits of a passing track safe for its foreseeable use as a work place, was not a proximate cause of injuries sustained by a conductor who stepped off a caboose standing over the bridge in the nighttime.

In this case, as in the *Pauly* case, the Utah Supreme Court has held that petitioner's conduct was the sole proximate cause of his injuries. It is respectfully submitted that petitioner's negligence, if any, was for the jury, and then only in connection with the assessment of damages. The evidence demonstrated that petitioner acted in accordance with the practice and custom being followed in the coach yards at Denver. This finding of negligence on the part of petitioner was employed by the Utah Supreme Court to support its major finding of absence of duty on the part of respondents and thus to become a complete defense to petitioner's action. Contributory negligence has been eliminated as a defense by the express terms of the Federal Employers' Liability Act, U. S. C. A., Title 45, Sec. 53. The holding of the Utah Supreme Court is contrary to the holding of this Court in the following cases: *Grand Trunk West-*

ern R. R. Co. v. *Lindsay*, 233 U. S. 42, 47, 34 S. Ct. 581, 58 L. Ed. 838, 842; *Tiller* v. *Atlantic Coast Line R. Co., supra; Illinois C. R. Co.* v. *Skaggs*, 240 U. S. 66, 36 S. Ct. 249, 60 L. Ed. 528; *Union Pacific R. Co.* v. *Hadley*, 246 U. S. 330, 38 S. Ct. 318, 62 L. Ed. 751.

The condition of the work place having contributed to the cause of the injury, the questions of respondents' negligence in failing to exercise ordinary care to provide their employees a reasonably safe place to work and proximate cause, should have been submitted to the jury, and the Utah Court erred in denying petitioner the right to have the jury pass on these questions. *Rocco* v. *Lehigh Valley R. R. Co.*, 288 U. S. 275, 53 S. Ct. 343, 77 L. Ed. 743; *Miller* v. *Central R. Co.*, 58 F. (2d) 635 (C. C. A. 3rd, 1932); *Gildner* v. *Baltimore & O. R. Co.*, 90 F. (2d) 635 (C. C. A. 2nd, 1937); *Mumma* v. *Reading Co.*, 146 F. (2d) 215 (C. C. A. 3rd, 1944); *Norfolk & W. Ry. Co.* v. *Riggs*, 98 F. (2d) 612 (C. C. A. 6th, 1938); *Ballard* v. *Atchison T. & S. F. Ry. Co.*, 100 F. (2d) 162 (C. C. A. 5th, 1938); *Atchison T. & S. F. Ry. Co.* v. *Ballard*, 108 F. (2d) 768 (C. C. A. 5th, 1940); *McCarthy* v. *Pennsylvania R. Co.*, 156 F. (2d) 877 (7th C. C. A. 1946); *Ellis* v. *Union Pacific, supra.*

In the most recent decision from this Court, *Doris Anderson, Administratrix of the Estate of L. C. Bristow, deceased,* v. *The Atchison, Topeka and Santa Fe Railway Company, a corporation*, not yet officially reported, but published in 16 L. W. Commencing at page 4375, this Court construed and applied, with liberality, that portion of the Federal Employers' Liability Act which provides a remedy in every situation where the negligence of the carrier contributes "in whole or in part" to the cause of the injury. The Court declared:

> "• • • We are unable to agree that had petitioner been permitted to introduce all evidence rele-

vant under her allegations, the fact would have revealed a situation as to which a jury under appropriate instructions could not have found that decedent's exposure and consequent death were due 'in whole or in part' to failure of respondent's agents to do what 'a reasonable and prudent man would ordinarily have done under the circumstances of the situation.' "

Conclusion

It is respectfully submitted that the opinion of the majority of the Supreme Court of Utah in this case is in conflict with express provisions of the Federal Employers' Liability Act and controlling decisions of this Court construing that Act; that a Writ of Certiorari should be granted in order for this Court to review the record and the opinion of the Utah Court and finally reverse the same and remand the cause to the state courts for jury trial in accordance with the law.

Respectfully submitted,

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